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In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1607

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

SAMUEL H. SLOAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

SAMUEL H. SLOAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. B, *infra*, pp. 3a-17a), as modified (App. C, *infra*, pp. 18a-20a), is reported at 547 F. 2d 152.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1976 (App. A, *infra*, p. 1a). A timely petition for rehearing was denied by the original panel on December 27, 1976 (App. C, *infra*, p. 18a), and the contemporaneous suggestion for rehearing *en banc* was rejected on January 24, 1977 (App. F, *infra*, p. 27a). On March 17, 1977, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including April 25, 1977, and on April 22, 1977, he granted a further extension to and including May 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission's authority under Section 12(k) of the Securities Exchange Act of 1934 summarily to suspend trading in a security "for a period not exceeding ten days" may be exercised at the expiration of an earlier ten-day suspension ordered pursuant to the same statute.

2. Whether a suit to review the propriety of consecutive suspension orders becomes moot once trading in the particular security is permitted to resume, in the absence of any showing that the party seeking review is likely to be affected by consecutive suspension orders in the future.

STATUTES INVOLVED

Sections 12(j) and 12(k) of the Securities Exchange Act, Pub. L. 94-29, 89 Stat. 118, 15 U.S.C. (Supp. V) 78*l*(j) and 78*l*(k), former Section 15(c)(5) of the Act, 78 Stat. 574, 15 U.S.C. (1970 ed.) 78*o*(c)(5), and former Section 19(a)(4) of the Act, 48 Stat. 898, 15 U.S.C. (1970 ed.) 78s(a)(4), are set forth at App. G, *infra*, pp. 28a-29a.

STATEMENT

On April 29, 1975, the Securities and Exchange Commission issued an order, pursuant to former Sections 15(c)(5) and 19(a)(4) of the Securities Exchange Act, 15 U.S.C. (1970 ed.) 78*o*(c)(5) and 78s(a)(4), suspending public trading in the common stock of Canadian Javelin, Ltd. ("CJL") for ten days, because the Royal Canadian Mounted Police had commenced an extensive investigation into alleged manipulation of CJL common stock on the American Stock Exchange and several Canadian stock exchanges (C.A. App. A-11, A-12).[1] At the same time, the Commission, acting under Section 21(a) of the Securities Exchange Act, 15 U.S.C. 78u(a), commenced its own investigation into allegations of manipulative activities by CJL insiders. During the course of the latter investigation, the Commission made a series of separate determinations suspending trading in the stock for successive ten-day periods. The trading suspen-

[1] "C.A. App." refers to the appendix in the court of appeals.

sion was lifted in May 1976, when the Commission's investigation had resulted in the filing of a civil action, *Securities and Exchange Commission* v. *Doyle, et al.*, Civ. Action No. 76-1882 (S.D.N.Y.).

The Commission earlier, by successive orders, had suspended trading in CJL stock, from November 29, 1973, through January 26, 1975, because of false and misleading press releases. See Securities Exchange Act Release No. 11,172 (1975). Respondent Samuel H. Sloan owned 13 shares of CJL common stock. He had filed a petition in the United States Court of Appeals for the Second Circuit for review of those suspension orders (App. B, *infra*, p. 8a). When trading in CJL stock again was suspended in April 1975, respondent amended his petition to challenge those orders as well. The court of appeals indicated that the tacking of successive suspension orders might raise a substantial question, but it concluded that the record was inadequate and therefore dismissed respondent's claim on this issue without prejudice. *Sloan* v. *Securities and Exchange Commission*, 527 F. 2d 11, 12 (C.A. 2).

The Commission subsequently rejected respondent's request that it refrain from renewing the then current suspension and that it declare the past suspension orders illegal (App. D, *infra*, p. 21a). The Commission noted, among other things, that it was "actively investigating * * * possible manipulation of [CJL] stock in the United States securities markets" and that a criminal information had been returned in Canada indicating that CJL common stock "may

have been artificially manipulated on two Canadian stock exchanges * * *" (App. D, *infra*, p. 22a).

Respondent again petitioned for review, and the court of appeals reversed and directed the Commission "to discontinue forthwith its adoption and use of successive ten-day suspension orders * * *" (App. B, *infra*, p. 17a). The court of appeals held that the wording of Section 12(k) of the Act,[2] authorizing suspension "for a period not exceeding ten days" does not authorize consecutive suspensions. The court rejected the Commission's contentions that Congress had acquiesced in the practice of consecutive suspensions and that the case had become moot when suspension of trading in CJL stock was lifted in May 1976.[3]

REASONS FOR GRANTING REVIEW

The decision below, by holding that the Commission has no statutory authority to issue consecutive suspension orders, eviscerates one of the principal tools available to the Commission for protecting the investing public against suspected fraud or manipulation of the market for particular securities.[4] The

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[2] Section 12(k) of the Act, 15 U.S.C. (Supp. V) 78*l*(k), is the successor to former Sections 15(c)(5) and 19(a)(4). See p. 6, *infra*.

[3] The court of appeals, in denying rehearing, modified its opinion in a manner not pertinent here (App. C, *infra*, pp. 18a-20a).

[4] For a general discussion of the Commission's suspension power, see Goldman & Magrino, *Suspension of Trading in Securities: Some Observations on Section 15(c)(5) of the Securities Exchange Act of 1934*, 15 N.Y.L. Forum 633 (1969).

court of appeals has overturned 33 years of consistent administrative practice, a practice in which Congress had expressly acquiesced. The court did so, moreover, in a case that was moot under the standards this Court has applied in the past.

There is no conflict among the courts of appeals on the statutory question presented here. But in view of the administrative importance of the issue and the fact that the Second Circuit encompasses the Nation's financial center, where the issue is most likely to arise, this case presents "an important question of federal law which has not been, but should be, settled by this court." Rule 19(1)(b) of the Rules of this Court.

1. Former Section 19(a)(4) of the Securities Exchange Act of 1934 granted the Commission authority summarily to suspend trading in securities listed on national exchanges. This authority was extended to over-the-counter securities in 1964 by the enactment of former Section 15(c)(5) of the Act. In 1975, these two provisions were consolidated in present Section 12(k) of the Act, which authorizes the Commission summarily to suspend trading "for a period not exceeding ten days."

Pursuant to this authority, the Commission in the past has found it necessary, for the protection of the investing public, to suspend trading in at least five different kinds of situations. As Professor Loss describes (V Loss, *Securities Regulation* 2816-2822 (1969 Supp.)):

> (1) There have been a few cases of what might be called the "crisis" type * * * [as, for for example, where] [t]he president resigned when it became known that he had withdrawn funds from the company. * * *
>
> (2) * * * [T]here is a group of cases in which the suspension was designed to prevent trading until the Commission might obtain appropriate injunctive relief, usually against fraud or manipulation or an unregistered distribution * * *. * * *
>
> (3) Most of the cases have involved simply a severe inadequacy of (or sometimes misleading) financial information. * * *
>
> (4) In all the cases in the last category * * * the Commission ultimately permitted trading to resume. There is another group of about the same size in which the Commission instituted a delisting proceeding contemporaneously with or shortly after its first suspension order, which was based similarly on a severe inadequacy of financial information, so that in most cases trading, at least on an exchange, never did resume. * * *
>
> (5) * * * [When] the market ha[s] been strongly influenced by news or rumors of doubtful accuracy * * *.

Adequate protection of the investing public in such circumstances often requires successive suspension orders that have the effect of suspending trading for a continuous period in excess of ten days. This was the case, for example, with the Commission's first use of its summary suspension power. *Elastic Stop*

Nut Corp. of America, Securities Exchange Act Release No. 3626 (1944). Before the extension of the Commission's summary suspension power to over-the-counter securities in 1964, the Commission had exercised that power with respect to 30 securities; only in one case was trading permitted to resume upon expiration of the first ten-day suspension. See Goldman and Magrino, *supra*, at 658-662; II Loss, *supra*, at 852-854 (2d ed. 1961). Professor Loss had noted with respect to those suspensions (*id.* at 854):

> Although the suspension power * * * is limited to ten days, the Commission followed the policy in these cases of entering a series of orders until it was able to issue a release stating the essential facts. And * * * it timed the lifting of its suspension so that the public would have some opportunity to be informed of those facts before the resumption of exchange trading. Presumably a single ten-day suspension order does not exhaust the Commission's power * * * if it makes a new determination every ten days of the necessity of continuing the suspension * * *.

Congress recognized and accepted this practice when it extended the Commission's summary suspension power to over-the-counter securities. The Senate Committee on Banking and Currency observed (S. Rep. No. 379, 88th Cong., 1st Sess. 66-67 (1963)):

> The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the 10-day period, it determines that another suspension is necessary. The committee accepts this interpretation.

Similarly, the House Committee on Interstate and Foreign Commerce agreed to the extension of the suspension power to over-the-counter securities (H.R. Rep. No. 1418, 88th Cong., 2d Sess. 24 (1964)) after it had been advised by the Commission that the Commission's practice was to issue consecutive suspension orders "when upon reexamination at the end of the 10-day period, it has determined that another suspension is necessary" and that "[t]he Commission would follow that policy in administering the proposed new [authority]." Hearings on Investor Protection before the Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. 219 (1963).

Between 1964 and November 1976, the suspension power was used with respect to 941 securities and in 235 of these cases consecutive orders were issued resulting in the suspension of trading for more than ten consecutive days.[8]

The Commission's consistent construction of its own statutory authority is entitled to judicial deference. See, *e.g.*, *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *Udall* v. *Tallman*, 380 U.S. 1, 16. Where Congress has reenacted or amended a statute without disapproving

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[8] This information was derived by the Commission from a review of its records.

the agency's construction, Congress may appropriately be considered to have approved that construction as correct. See, *e.g.*, *United States* v. *Correll*, 389 U.S. 299, 305-306; *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272, 283; *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345. This general doctrine has even greater force, moreover, where, as here, the pertinent Senate Committee explicitly endorsed the agency's construction.

In these circumstances, the court of appeals should not have rejected the Commission's reading of its statutory powers. The court did so largely on the basis of its view that Section 12(j) of the Act, which permits the Commission to suspend the registration of a security for up to twelve months upon a finding, after notice and hearing, "that the issuer of such security has failed to comply with any provision of this title," obviates the need for consecutive suspensions under Section 12(k). But section 12(j) does not displace Section 12(k): the former provision may be invoked only where there is misconduct by the issuer, whereas the latter more broadly protects against, *inter alia*, manipulation by third parties, corporate crises, or other events that interfere with the market for a particular security. Moreover, even where issuer misconduct threatens to disrupt the market, summary suspension of trading under Section 12(k) may usefully complement the Section 12(j) authority as a means of ensuring the protection of investors while the process of notice and hearing

goes forward under the latter provision.[6] Accordingly, the court erred in holding that consecutive ten-day suspensions are not permitted under the Act.

2. The court of appeals also erred in not dismissing respondent's petition as moot. The suspension of trading in CJL stock had been terminated in May 1976, prior to argument below and more than five months before the decision in this case. The court nevertheless concluded that the case was not moot, reasoning that "[b]ecause of the [Commission's] continuing policy of roll-over ten-day suspension orders, the harm to [respondent] was 'capable of repetition yet evading review'" (App. B, *infra*, p. 16a). But as this Court explained in *Weinstein* v. *Bradford*, 423 U.S. 147, 149, "*Sosna* [v. *Iowa*, 419 U.S. 393,] decided that in the absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable

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[6] Suspension of trading under Section 12(k), rather than under Section 12(j), does not deprive persons adversely affected by consecutive suspensions of an opportunity to be heard. Pursuant to Securities Exchange Act Release No. 12361 (1976), persons claiming to be adversely affected by a summary suspension may petition the Commission not to renew the suspension, "and if upon examination of the petition the Commission is of the opinion that there is a genuine issue as to any material fact, the Commission will provide an opportunity for prompt presentation of all material facts" (App. E, *infra*, p. 25a).

expectation that the same complaining party would be subjected to the same action again." *Cf. Securities and Exchange Commission* v. *Medical Committee for Human Rights*, 404 U.S. 403. This is not a class action, and respondent has not shown that he is likely to be adversely affected by consecutive suspension orders in the future.[7] Accordingly, respondent's case is moot and should not have been decided on the merits.[8] Cf. *Securities and Exchange Commission* v. *Lea Fabrics, Inc.*, 363 U.S. 417.

[7] Trading in CJL stock was permitted to resume once all the facts relating to issuer misconduct had been made public. Since the investing public now has been apprised of the relevant facts, the concealment of which had threatened to disrupt the market in CJL stock, there is no reason to believe that it will be necessary to suspend trading again.

[8] We recognize that the issue of mootness raised here may not warrant this Court's plenary review and that the fact of mootness militates against review of the statutory issue. But the court of appeals' direction to the Commission that it "discontinue forthwith its adoption and use of successive ten-day suspension orders" (App. B, *infra*, p. 17a) has cast a substantial shadow over the Commission's right to exercise its suspension powers. See, *e.g.*, *Buchman* v. *Securities and Exchange Commission*, No. 76-4184, decided April 20, 1977 (C.A. 2) (slip op. 3095 n. 3). In these circumstances, the Court may conclude that the court of appeals' decision should not be allowed to stand and that its holding on the issue of mootness is sufficiently contrary to this Court's recent decisions to warrant summary reversal. Cf. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

HARVEY L. PITT,
General Counsel,

VAN P. CARTER,
Special Counsel,

FREDERICK B. WADE,
Attorney,
Securities and Exchange Commission.

MAY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of November, one thousand nine hundred and seventy-six.

Present: HON. HAROLD R. MEDINA,
HON. ROBERT P. ANDERSON,
HON. MURRAY I. GURFEIN, C.JJ.
Circuit Judges

76-4110

[Filed Nov. 18, 1976]

SAMUEL H. SLOAN, PETITIONER,

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT.

A PETITION FOR REVIEW OF ORDERS OF THE SECURITIES AND EXCHANGE COMMISSION

This cause came on to be heard on the administrative record of the Securities and Exchange Commission and was argued

Upon consideration thereof, it is now hereby ordered, adjudged and decreed that the orders of the Securities and Exchange Commission be and they hereby are affirmed in part and that the petition for review be and it hereby is granted in part in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by: /s/ Vincent A. Carlsin
Chief Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 36 and 266—September Term, 1976

(Argued October 13, 1976
Decided November 18, 1976)

Docket Nos. 75-4087 and 76-4110

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.,
PETITIONER,

v.

SECURITIES AND EXCHANGE COMMISSION, RAY GARRETT, JR., PHILIP A. LOOMIS, JR., JOHN R. EVANS, A. A. SOMMER, JR., GEORGE A. FITZSIMMONS, RESPONDENTS.

SAMUEL H. SLOAN, PETITIONER,

v.

SECURITIES & EXCHANGE COMMISSION, RESPONDENT.

Before:

MEDINA, ANDERSON and GURFEIN,
Circuit Judges.

Petitions for review of S.E.C. order revoking broker-dealer registration and barring petitioner from association with any broker or dealer (Case No. 75-4087), and for review of the validity of a series of S.E.C. orders suspending trading in the stock of a certain corporation (Case No. 76-4110). S.E.C. orders affirmed in Case No. 75-4087, and declared invalid, except for the first order, in Case No. 76-4110.

SAMUEL H. SLOAN, *Pro Se*, Bronx, New York.

DAVID FERBER, Solicitor to the Commission and FREDERICK B. WADE, Esq., Securities and Exchange Commission, Washington, D. C., *for Respondents.*

ANDERSON, *Circuit Judge*:

Case No. 75-4087

This is the appellant Samuel H. Sloan's latest maneuver in his long struggle to avoid compliance with the Securities and Exchange Act and disciplinary measures brought by the S.E.C.[1] He is now seeking a review of the order of the Commission, dated April 28, 1975, revoking the broker-dealer registration of

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[1] A history of Sloan's litigation with the S.E.C. is set out in this court's opinions in *Sloan* v. *SEC*, *slip op.* 2377, 2379, and nn. 2, 3 (2d Cir. March 4, 1976), and *SEC* v. *Sloan*, *slip op.* 3655, 3656 (2d Cir. May 10, 1976).

Samuel H. Sloan d/b/a Samuel H. Sloan & Co., and barring him from associating with any broker or dealer.

He argues, *inter alia*, that his constitutional rights were violated when the SEC refused to let him withdraw his broker-dealer registration as Sloan & Co., which he attempted to do as soon as the SEC took the first steps to revoke the license. As authority for his right to do this he cites *Jones* v. *SEC*, 298 U.S. 1 (1936). But that case dealt with the withdrawal as a matter of right, under the Securities Act of 1933, of a *registration statement* concerning *securities*. It had nothing whatever to do with a broker-dealer licensing registration.

The petitioner declares that § 15(b) of the Securities Exchange Act of 1934 is a criminal statute, which makes broker-dealers inherently suspect with respect to criminal activities. He, therefore, asserts that a statutory or regulatory provision which requires them to furnish information about activities which have been made criminal under some provision of the Act, in effect, compels them to testify against themselves. He equates his own case with *Leary* v. *United States*, 395 U.S. 6 (1969), and *Marchetti* v. *United States*, 390 U.S. 39, 47 (1968), where respectively (a) disclosure of possession of marihuana or (b) wagering activities for tax purposes exposed the taxpayer to prosecution under state and federal laws. The argument, of course, has no bearing on the present case because the applicable statute with which the case is concerned is not criminal but clearly

regulatory in nature. The Supreme Court carefully pointed up this distinction in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79 (1965).

The petitioner also complains that his Fifth Amendment right to notice and a hearing and his Sixth Amendment right to be informed of the nature of the charges against him were violated. It appears from the record that the proceedings by the SEC against Sloan were commenced on April 25, 1972 by mailing to Sloan a three page order for public proceedings. Petitioner does not claim that he did not receive them, and he in fact appeared through his counsel. Although he received notice, he goes on to complain that the order did not give him a sufficiently full or definite statement of the "nature and the cause of the accusations against him." An examination of the Order for Public Proceedings, however, discloses that the allegations against Sloan were made with great particularity and in detail so that he was fully apprised of the claims made against him; he knew what the nature of the charges was, against which he had to defend himself.

He complains that the order was not signed or verified in accordance with Rule 11, C.R.F.P. and asserts that the S.E.C. was required to have specially pleaded allegations of fraud. But administrative proceedings are not bound to follow the Federal Rules of Civil Procedure.

Among other things the petitioner challenges the constitutionality of the Act itself, as he has done on numerous occasions in other actions. These former

attacks [1] were characterized by this court as "frivolous," and we are of the opinion that the present claims are equally so.

The remaining points sought to be raised by the petitioner have no merit and call for no comment. Moreover, prior to the revocation of Sloan's license by the S.E.C., the United States District Court for the Southern District of New York had issued a preliminary injunction, which it subsequently made permanent, ordering Sloan to discontinue his violations of the S.E.C. rules relating to record keeping and net capital. This court dismissed an appeal from the granting of this injunction. *S.E.C.* v. *Sloan*, 538 F. 2d 313 (2d Cir. 1976). Thereafter the same district court issued another preliminary injunction on January 17, 1975, prohibiting Sloan from submitting quotations of over-the-counter transactions to "the pink sheets." This court dismissed an appeal from this preliminary injunction on January 7, 1976. *S.E.C.* v. *Sloan*, *supra*. Each of these injunctions was in itself a sufficient ground to support the revocation of Sloan's broker-dealer license under § 15(b)5c of the 1934 Act.

The orders of the S.E.C. are affirmed.

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[1] See *Sloan* v. *SEC*, slip op. 2377, 2380 (2d Cir. March 4, 1976).

Case No. 76-4110

In an appeal brought by the petitioner Sloan from a series of ten-day suspension orders imposed by the S.E.C. upon the stock of Canadian Javelin, Ltd. (CJL), a Canadian corporation, in which Sloan had extensive dealings (principally in selling the stock short), this court handed down a decision on October 15, 1975, *Sloan* v. *Securities & Exchange Commission*, 527 F.2d 11 (2 Cir. 1975), *cert. denied* —— U.S. —— (June 14, 1976), in which it stated that the questions raised were frivolous except for the petitioner's allegation that the " 'tacking' of ten-day summary suspension orders by the SEC for an indefinite period constitutes an abuse of that agency's authority and a deprivation of due process. Apparently this question has never been judicially considered and would seem not to be frivolous . . . ." 527 F.2d at 12. The pleadings in the case then on appeal concerned only the first of a series of ten-day suspension orders which ran from November 29, 1973 through January 26, 1975. At the time the appeal was actually heard, however, a second series of ten-day suspension orders was in progress which ran from April 29, 1975 through May 2, 1976. This court was of the opinion that in the absence of any record dealing with this second series of suspensions, it was not in a position to decide whether the second series was based on substantial evidence or if it constituted an abuse of discretion by the S.E.C. Another factor which this court noted was that the ap-

plicable statute had been amended on June 4, 1975 and the relevant sections are now §§ 12(j) and (k) of the 1934 Act, 15 U.S.C. §§ 78*l*(j) and (k).[a] The amended statute applies to that portion of the second series of ten-day suspension orders issued between June 4, 1975 and May 2, 1976.

In the course of its argument before this court on the prior appeal, the S.E.C., though it did not say

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[a] Sections 78*l* (j) and (k) read as follows:

"(j) The Commission is authorized by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

(k) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding ninety days. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended."

that any statute or regulation required it, offered to grant petitioner Sloan "some sort of administrative hearing." The court noted that this would satisfy any possible exhaustion requirement and would at the same time fill out the record which the court found to be "insurmountably sparse." In the light of this development, the court dismissed Sloan's appeal without prejudice to his repleading after an administrative hearing before the SEC from which judicial review might be sought.

This decision was filed on October 15, 1975 and Sloan immediately petitioned the S.E.C. for the promised hearing. The Commission rejected his petition because it was not verified or properly formulated. On March 11, 1976 Sloan filed a new and verified petition to the Commission, demanding the hearing and requesting a declaration that the successive orders of suspension were illegal, that they violated his due process rights and the Securities Exchange Act. The decision of the Commission rejecting Sloan's petition and refusing to give him the above mentioned administrative hearing was handed down on April 21, 1976, long after the effective date of the amended statute and while the second series of ten-day suspension orders was still being issued. Thereafter on April 23, 1976 and during the time the April 21, 1976 suspension order was operating, Sloan brought the present appeal pursuant to § 25 (a) of the 1934 Act, 15 U.S.C. § 78y(a)(1) (as amended, 1975), for review of this second series of suspension orders. He alleges (1) that there was no

rational basis for the trading suspensions and the orders were not supported by substantial evidence; (2) that the suspension orders violated his due process rights because at no time has he been afforded notice and an opportunity for a hearing; (3) that the successive summary suspension orders, the "tacking" of ten-day orders, are unlawful because the statute specifically authorizes summary suspension of trading only "for a period not exceeding ten days"; (4) that § 78*l*(k) is an unconstitutional delegation of Congress' legislative power because a suspension of trading in a security is "legislation"; and (5) that the present proceeding is not moot even though there are no suspension orders now in effect.

With respect to the first of these claims, an examination of the record discloses there was sufficient evidence of probable manipulation of CJL's common stock and of the false and fraudulent representations as to its soundness and value to justify the Commission's conclusion that the public interest and the protection of investors required it summarily to suspend trading "for a period not exceeding ten days" in accordance with both the previous sections, 19(a)(4) and 15(c)(5), as well as the new section 12(k), and the Commission, therefore, suspended trading of the stock for ten days commencing April 29, 1975.

At the end of this first ten-day suspension period, the Commission decided that under the circumstances the suspension order should be continued for an additional ten days. It asserts that it did this on the basis of an independent determination made at the

time that continued suspension was required in the public interest and for the protection of investors. At the end of the second ten-day suspension period, it made a like determination and ordered a further ten-day suspension and then made another determination and order and another and another until the total suspension periods covered a span of 370 days or 37 ten-day suspension periods. In spite of the wording of the statute, both before and after the amendment of 1975, which authorized suspension "for a period not exceeding ten days," the Commission made its own interpretation of the statute through which it claimed to have the power to order any number of ten-day suspension periods which could total many months or even years. It relies in some measure upon legislative history which concerned the earlier act, i.e., Securities & Exchange Act of 1934, § 15(c)(5) and § 19(a)(4), 15 U.S.C. § 78o(c)(5) and § 78s(a)(4), to support the legality of such tacking of ten-day orders. Although a few comments by individual senators and congressmen indicated that they were aware that the S.E.C. was using successive ten-day suspension orders for periods of extended duration, no express statutory authority for this procedure was ever enacted. The Commission further claims that the practice of roll-over ten-day suspension orders, which developed before the 1975 amendment, was carried over to the newly amended law of June 4, 1975, because Senate Report No. 94-75, 94th Cong., 1st Sess. (1975), p. 106, stated that the proposed § 12(k) "would con-

solidate in one place the power the SEC presently has to . . ." issue summary trading suspension orders. We disagree, however, with the Commission's rather free interpretation of the statute and its claims as to the legislative intent.

Section 12(k) of the 1975 amended statute, was a consolidation of the prior sections 15(c)(5) and 19(a)(4). It authorized the SEC to issue summary suspension orders, but it did not empower the Commission to adopt the arbitrary practice of issuing a string of successive ten-day suspension orders such as those promulgated in the present case. More revealing of congressional intent is the paragraph concerning subsection (j) in Senate Report No. 94-75, *supra*, at 105-106, which recites the authority the SEC has "to suspend for a period not exceeding twelve months [n.b. not a summary suspension] . . . after notice and opportunity for hearing . . ." if the Commission finds

> "that the issuer of such security has failed to comply with any provision of the Exchange Act or the rules and regulations thereunder. It would also make unlawful any trading in any such security by any broker or dealer. *With this change, the Commission is expected to use this section rather than its ten-day suspension power in cases of extended duration.*" (Emphasis added.)

This discussion immediately preceded the summary suspension power granted the Commission in subsection (k) and must be read in conjunction with it in

determining congressional intent. It must also be borne in mind that the amended statute, as did its predecessor, also provides for an additional summary suspension procedure for a period between the "not exceeding ten day" suspension power and the "not exceeding twelve months" suspension power, and that is, in subsection (k) where the Commission is authorized "with the approval of the President, summarily to suspend all trading on a national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding *ninety* days." (Emphasis added.) It is clear that the congressional scheme for empowering the SEC to suspend trading in a stock or stocks for specified periods, authorized summary action for ten days and/or ninety days to meet emergency situations, to protect the public interest and afford protection of investors. For suspensions required for periods in excess of ninety days but not in excess of twelve months, a notice and a hearing prior to suspension are required. It was also clearly a part of the congressional scheme that the power to order ten-day suspensions was not to be used in cases of extended duration, that is to say they should not be used as a substitute for a period between ten and ninety days or for any time in excess of ninety days, such as in the present case where the suspensions ran on for more than a year.

The petitioner also claims that his constitutional rights were violated by the series of suspension orders because he was never afforded notice and an opportunity for a hearing. It is not necessary to

deal with this point as a constitutional violation, however, because the procedures adopted by the SEC plainly transgressed the statutory provisions. For a single ten-day suspension no prior notice or hearing is required because the proceeding is summary in nature and because the emergency aspect of the order, issued to protect the public interest and give protection to investors, makes it necessary. Likewise, a suspension of ninety days or less is a summary proceeding, safeguarded by the prerequisite of presidential approval. The total period of successive suspensions in this case, however, ran for almost eleven months from the effective date of the amended act, June 4, 1975. Certainly the statute contemplates that for so long a period of ordered suspension in trading of a particular stock, a person aggrieved by the order should be afforded notice and a hearing as soon as it appears that the suspension will probably exceed ninety days.

The only remaining point advanced by the petitioner on appeal, which requires some comment, is the issue of mootness raised by the SEC, which asserts that since May 2, 1976, there has been no ten-day suspension order as to trading of CJL stock, that there are no plans on the part of the SEC to consider or to issue one and no real likelihood that one will be issued in the foreseeable future.

The petitioner claims that he has suffered great loss and damage because the suspension orders frustrated his trade in CJL stock, including short sales, and that each succeeding ten-day suspension expired

before he could seek a legal review of the validity of the order.* Because of the SEC's continuing policy of roll-over ten-day suspension orders, the harm to him was "capable of repetition yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911); *Sosna* v. *Iowa*, 419 U.S. 393 (1975). See also *Weinstein* v. *Bradford*, 423 U.S. 147 (1975).

This petition for review was filed before the expiration of the last ten-day suspension of the second series now before us for consideration. Moreover the petitioner had raised the question before this court in connection with its October 15, 1975 decision and again before the SEC in connection with the present case. We declare that the successive roll-over ten-

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* This court in its October 15, 1975 decision in Sloan's prior case found that the petitioner had standing, as one aggrieved. At the time he filed his petition in that case he was a trade-dealer doing business under the name of Samuel H. Sloan & Co. He dealt in several different corporate stocks, including the common stock of Canadian Javelin, Ltd., a Canadian corporation. As an individual he owned thirteen shares of Javelin common stock. On April 28, 1975 the S.E.C. revoked his registration and license, so that for the remainder of the time within which this case is concerned, Sloan was not licensed to trade.

We are of the opinion that his private ownership of the common shares is sufficient to confer standing on the petitioner to ask for a review in this case under 15 U.S.C. § 78(y) within 60 days of the S.E.C.'s promulgation of its order. *Medical Committee for Human Rights* v. *S.E.C.*, 432 F.2d 659, 667 (D.C. Cir. 1970). The effect of the suspension order on Sloan, an existing shareholder, is equivalent to an injunction preventing him from selling his shares. He, therefore, has standing. We do not pass on whether individual shareholders have standing in other types of SEC proceedings.

day suspension procedure erroneously adopted by the SEC was improperly pursued and was contrary to the statutory provisions for summary suspensions in force April 30, 1975 to May 2, 1976. The issue of statutory construction and interpretation never became moot and has been ruled upon in this review. The SEC is, therefore, directed to discontinue forthwith its adoption and use of successive ten-day suspension orders to order the suspension of trading in a security for an extended period, i.e. in excess of ten days.

It is so ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 36, 266—September Term, 1976

(Petition Decided December 27, 1976)

Docket Nos. 75-4087, 76-4110

SAMUEL H. SLOAN, PETITIONER,

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT.

Before:

MEDINA, ANDERSON and GURFEIN,
Circuit Judges.

ON REHEARING

PER CURIAM:

The petition in this case by the Securities and Exchange Commission for a rehearing on the decision by this court on November 18, 1976 ". . . insofar as it deals with the Commission's authority to issue successive summary trading suspensions . . ." is denied.

In the course of reviewing the appeal, the briefs of the parties and the opinion and judgment of the court, this court arrived at the conclusion that the portions of the memorandum of decision which discussed the 90-day suspension provision of 15 U.S.C. § 78(k) should be excised from the opinion and revoked as having had no constituent part in the holding in the case.[1] It was included as a part of the

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[1] The portions of the court's opinion to be excised are: Slip opinion of November 18, 1976, at the bottom of page 563, the sentence commencing with the words, "It must also be borne in mind that . . ." through the next two sentences on page 564 beginning with the words, "It is clear . . ." through the words, ". . . prior to suspension are required." From the following sentence "it was also clearly . . ." delete the word "also"; and in the same sentence excise the clause beginning with the words, ". . ., that is to say . . ." and ending ". . . excess of ninety days."

Also excise the three sentences from and including the second sentence from the bottom of page 564, beginning "Likewise, a suspension" and including the next two sentences through to the end of the paragraph ending at the top of page 565 with the words, ". . . exceeding ninety days."

That portion of the opinion will now read:

> "This discussion immediately preceded the summary suspension power granted the Commission in subsection (k) and must be read in conjunction with it in determining congressional intent. It was clearly a part of the congressional scheme that the power to order ten-day suspensions was not to be used in cases of extended duration, such as in the present case where the suspensions ran on for more than a year.
>
> The petitioner also claims that his constitutional rights were violated by the series of suspension orders because he was never afforded notice and an opportunity for a hearing. It is not necessary to deal with this point as a constitutional violation, however, because the procedures

legislative framework of the Act as it dealt with suspension of trading in securities on a national exchange. It is not necessary to the decision in the case; and, in view of the variety of implications and interpretations which may be and have been made of the 90-day suspension provision, the court has concluded it should best be deleted. The memorandum of decision of November 18, 1976 is therefore amended accordingly.

The judgment of this court is reaffirmed in all other respects.

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adopted by the SEC plainly transgressed the statutory provisions. For a single ten-day suspension no prior notice or hearing is required because the proceeding is summary in nature and because the emergency aspect of the order, issued to protect the public interest and give protection to investors, makes it necessary.

The only remaining point . . ."

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

April 21, 1976

IN THE MATTER OF TRADING IN SECURITIES OF
CANADIAN JAVELIN LTD.

Securities Exchange Act of 1934 Section 12(k)

NOTICE OF SUSPENSION OF TRADING

On March 11, 1976, the Commission received a petition from Mr. Samuel H. Sloan seeking review of all of the suspensions of trading in Canadian Javelin Ltd. securities from November 29, 1973, to date. Mr. Sloan asked, among other things, that the Commission refrain from renewing the trading suspension of Canadian Javelin Ltd. and that the Commission declare that the previous trading suspensions were illegal.

Mr. Sloan states that he is the owner of 13 shares of Canadian Javelin Ltd., that in the past he has engaged in substantial purchases and short sales of shares of that stock, particularly during 1973 prior to a suspension of trading beginning on November 29, 1973.

On that date the Commission not only suspended trading of Canadian Javelin common stock, but also instituted a civil injunctive action against it and certain of its principals, charging violations of the registration and antifraud provisions of the Securities Act of 1933; of antifraud provisions of the Securities Exchange Act of 1934, as well as of annual and periodic reporting requirements of that Act. In addition, it was charged that false reports were filed with the Commission by Canadian Javelin Ltd. and that the company had disseminated a series of press releases containing false and misleading information relating to its purported development of Panamanian mineral properties. This resulted in a series of suspensions which concluded on January 26, 1975.

According to criminal informations returned in Canada, it appears that the common stock of Canadian Javelin may have been artificially manipulated on two Canadian stock exchanges, and that this was continuing after January 26, 1975. The Commission is actively investigating, among other things, possible manipulation of the stock in the United States securities markets. The Commission on April 29, 1975, again suspended trading as a result of a lack of information concerning pending investigative action by Canadian regulatory authorities.

In addition, a number of private civil suits are pending in Canada involving a dispute regarding control of the company. A Canadian provincial court recently issued an order installing a new board of directors and this order is now on appeal.

Mr. Sloan pointed out that the most recent annual report issued by by [*sic*] Canadian Javelin Ltd. contains an earnings statement and a balance sheet of Canadian Javelin Ltd., both of which are certified by the accounting firm of Lee & Martin. Since March 31, 1976, however, the company has been delinquent with respect to the filing of its 10-K report.

Mr. Sloan also contends that the trading suspension aids Mr. Doyle to the detriment of United States stockholders and concludes from this "that in all probability Mr. Doyle is bribing a person or persons at the SEC in order to bring about repeated suspensions of Canadian Javelin Ltd." The facts he alleges in no way support this speculation.

Accordingly, it appearing to the Securities and Exchange Commission that the summary suspension of trading in the securities of Canadian Javelin Ltd. being traded on a national securities exchange or otherwise is required in the public interest and for the protection of investors;

THEREFORE, pursuant to Section 12(k) of the Securities Exchange Act of 1934, trading in such securities on a national securities exchange or otherwise is suspended, for the period from April 23, 1976, through May 2, 1976.

By the Commission.

/s/ George A. Fitzsimmons
GEORGE A. FITZSIMMONS
Secretary

APPENDIX E

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SECURITIES EXCHANGE ACT
RELEASE NO. 12361

April 22, 1976

SUMMARY SUSPENSIONS

The Securities and Exchange Commission today announced the adoption of procedures by which any person adversely affected by a summary suspension pursuant to Section 12(k) of the Securities Exchange Act may obtain prompt consideration by the Commission of the reasons such person believes the continued suspension is not in the public interest or is not required for the protection of investors. Section 12(k) authorizes the Commission summarily to suspend trading in securities for 10-day periods, if in its opinion the public interest or the protection of investors so requires.

The usual purpose of a suspension is to alert the investing public to the fact that there is insufficient public information about the issuer upon which an informed investment judgment can be made or that the market for the securities may be reacting to manipulative forces or deceptive practices. Consequently the primary issues normally to be considered by the Commission in determining whether or not 10-day suspensions should be instituted or renewed

are whether or not there is sufficient public information upon which to base an informed investment decision or whether the market for the security appears to reflect manipulative or deceptive activities.

If any person adversely affected by such suspension or who would be adversely affected by the renewal of the suspension desires to show that such suspension is not necessary in the public interest or for the protection of investors, he may petition the Commission that it not renew the suspension. Such petition, which may be in the form of a letter or other statement, should set forth with particularity the facts upon which petitioner relies and should be sworn to by the petitioner or an authorized officer of the petitioner.

If the petitioner so requests in the petition, and if upon examination of the petition the Commission is of the opinion that there is a genuine issue as to any material fact, the Commission will provide an opportunity for prompt presentation of all material facts. If no such opportunity is requested in the petition or if in the opinion of the Commission there is no genuine issue as to any material fact, the Commission will determine the issue upon the basis of the information contained in the petition and any other relevant facts known to the Commission.

The Commission will not be disposed to grant any such petition if the petitioner or any one affiliated with the petitioner shall fail to cooperate in supplying relevant information to the Commission or shall

in any way obstruct any inquiry by the Commission into the relevant facts.

By the Commission.

/s/ George Fitzsimmons
GEORGE FITZSIMMONS
Secretary

APPENDIX F

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of January, one thousand nine hundred and seventy-seven.

Docket No. 75-4087 [*]

SAMUEL H. SLOAN, d/b/a SAMUEL H. SLOAN & COMPANY, PETITIONER,

v.

SECURITIES & EXCHANGE COMMISSION, ET AL., RESPONDENTS.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the respondent (S.E.C.), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

[* No. should be 76-4110]

APPENDIX G

Section 12(j) and (k) of the Securities Exchange Act of 1934, as amended, Pub. L. 94-29, 89 Stat. 118, 15 U.S.C. (Supp. V) 78*l*(j) and (k) provide:

> "(j) The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence."
>
> "(k) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding ninety days. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended."

Former Section 19(a)(4) of the Securities Exchange Act of 1934, 48 Stat. 898, 15 U.S.C. 78s(a)(4) provided in pertinent part:

> "Section 19.(a). The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—
>
> • • • • •
>
> (4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days."

• • • • •

Former Section 15(c)(5) of the Securities Exchange Act of 1934, as amended, 78 Stat. 574, 15 U.S.C. 78*o*(c)(5) provided in pertinent part:

> "(5) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading, otherwise than on a national securities exchange, in any security (other than an exempted security) for a period not exceeding ten days. No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended."

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